DATO' HAJI MOHD. MUSLIM BIN OTHMAN

v.

SHUAIB BIN LAZIM & ANOR.

HIGH COURT, ALOR SETAR
DATO' HJ. ABDUL MALEK BIN HJ. AHMAD J.
[ELECTION PETITION NO. 1/1990
7 DECEMBER 1992]

ELECTION PETITION: State Legislative Assembly election - Whether first respondent was a person disqualified for election - Section 32(e) Election Offences Act 1954 - First respondent adjudged a bankrupt-Subsequent annulment of adjudication - Whether effect of annulment is to wipe out adjudication of bankruptcy altogether.

The first respondent was adjudicated a bankrupt on 21 February 1990. The first respondent submitted nomination papers for the constituency of Pantai Merdeka on 12 March 1990 and was duly elected as a member of the Kedah State Legislative Assembly. The first respondent applied to annul and rescind the adjudication and receiving orders which application was granted on 16 March 1990.

The petitioner, the unsuccessful candidate in the elections, filed the petition to declare the elections null and void and for himself to be declared as the elected representative.

Held:

[1] The annulment of the adjudication order on 16 March 1990 had the effect of wiping out the bankruptcy altogether.

[2] The first respondent was not a bankrupt on 12 March 1990 and was therefore not a disqualified person for the purposes of the election.

[3] The first respondent was duly elected to the Kedah State Constituency of Pantai Merdeka on 24 March 1990.

[Election petition dismissed with no order as to costs].

Cases referred to:

In Re Keet [1905] 2 KB 666 ***(foll)***

Kwong Yik Bank Bhd. v. Hah Chiew Yin [1985] 2 MLJ 452 [1985] 2 CLJ 31 ***(foll)***

Loknath Padhan v. Birendra Kumar Sahu [1974] 3 SCR 114 ***(refd)***

Re Wombwell's Settlement [1922] 2 Ch. 298 ***(refd)***

Cases listed at the end of the judgment as "cases referred to":

Devan Nair v. Yong Kuan Teik [1967] 1 MLJ 261

Tengku Korish v. Mohamed bin Jusoh & Anor.; Abdul Raouf v. Ibrahim bin Arshad & Anor.; Mokhtar bin Abdullah v. Mokhtar bin Haji Daud & Anor. [1970] 1 MLJ 6

Chong Thain Vun v. Watson & Anor; Hamid Datun v. Majanggil & Anor.; Richard E. Yap v. Tun Datu Mustapha bin Datu Harun [1968] 1 MLJ 65

Muip bin Tabib v. Dato James Wong; Wan Hamid bin Tuanku Surur v. Francis Lake [1971] 1 MLJ 246

Bong Geok Beng v. Ahmad Nordin bin Mohamed Amin & Anor.; Rosnah binte Kamarudin v. Samad bin Kassim & Anor.; Lai Keun Ban v. Tan Sri Chong Hon Nyen & Anor.; Mohamad bin Bakar v. Abdul Rashid bin Othman & Anor. [1980] 1 MLJ 167

Norbert Choong Kai Chong & Anor. v. Mohamed Idris bin Haji Ibrahim & Anor. [1980] 1 MLJ 316

Wilfred Nissom v. Datuk Stephen Yong & Anor. (Kuching High Court Election Petition No. K1/79)

Wan Daud bin Wan Jusoh v. Mohamed bin Haji Ali & Anor.; Daud bin Jusoh v. Annuar bin Haji Musa & Anor.; Mohd. Nor bin Ismail v. Mohd. Zain bin Abdullah & Anor. [1988] 2 MLJ 384

Dason Gabon v. Zulkifle bin Majun & 21 Other Cases [1982] 1 MLJ 315.

Sabdin Ghani v. Mohamed Saidi Lampoh & 25 Ors. Election Petitions [1983] 2 MLJ 61

Abdul Karim v. Mohamed Taib & Anor. [1969] 2 MLJ 72

Ooi Hee Koi v. PP; Ooi Wan Yui v. PP [1966] 2 MLJ 183

Bailey v. Johnson [1872] LR 7 Exch. 263

Sun Life Assurance Company of Canada v. Jervis [1944] AC 111

Zulkarnaini bin Mohamed Noor v. Syed Omar bin Mohamed & Anor. [1979] 2 MLJ 143

Re Shuaib bin Lazim, exparte Mercantile Insurance Sdn. Bhd. (Kuala Lumpur High Court D3-29-7415-89)

Legislation referred to:

Election Offences Act 1954, s. 32(e)
Election Petition Rules 1954, r. 4

For the petitioner - Wan Mutalib Embong, Hj. Suhaimi Kamaruddin & Jaafar Jusoh
For the first respondent - Ahmad Rashid
For the second respondent - Rauff Nabi Box

JUDGMENT

Hj. Abdul Malek bin Hj. Ahmad J:

After filing this election petition on 13 May 1990, the petitioner had filed an amendment to it on the 12 August 1990 and the grounds as stated in the amended election petition are:

(a) **that the ground of the petitioner's petition is that the 1st respondent was at the time of his election was a person disqualified for election vide s. 32(e) Election Offences Act 1954.**

(b) that for the said election to be held, on 12 March 1990, nomination papers for candidacy to the said election were presented to the 2nd respondent herein in respect of the two candidates, namely, the petitioner Dato' Haji Mohd. Muslim bin Othman and Shuaib bin Lazim the 1st respondent herein.

(c) that an objection to the nomination for candidacy to the said election of Shuaib bin Lazim, the 1st respondent to the 2nd respondent was made by the petitioner and Ghazali bin Salleh, the proposer to the petitioner who he himself being a person who has a right to vote at the above election on the ground that the 1st respondent was an undischarged bankrupt *vide* an order made on 21 February 1990 by the Honourable Mr. V. C. George in Kuala Lumpur High Court (Commercial Division) in Bankruptcy Petition No. D3-29-7415-89 and that being so the 1st respondent was at the material time a disqualified person to be nominated as a candidate to the said election and be elected as a member of the Kedah State Legislative Assembly under the provision of the Kedah State Constitution.

(d) that the 2nd respondent herein overruled the objection aforesaid and accepted the nomination for candidacy to the said election of the 1st respondent presented to the 2nd respondent by the 1st respondent and declared that the By-Electionto be contested between the petitioner and the 1st respondent in the election held on 24 March 1990 and the result of which the 1st respondent has won the said election and duly elected to the Kedah State Legislative Assembly.

He had further stated:

(a) that the 2nd respondent's rejection of the aforesaid objection to the nomination for candidacy to the said election of the 1st respondent on 12 March 1990 was wrong and bad in law;

(b) that the 2nd respondent's decision and declaration to have the said By-Election for the State Constituency of Pantai Merdeka a contested election on 24 March 1990 be declared null and void and the subsequent result declared pursuant to the by-election be further declared null and void and of no legal effect; and

(c) that the 1st Respondent being an undischarged bankrupt at the time of the nomination for candidacy to the said elect ion be declared unfit and a disqualified person from being a candidate at the said election and duly, elected as a member of the Kedah State Legislative Assembly.

Accordingly, he had asked for the following prayers:

(a) **that the 1st respondent be declared unfit and a disqualified person from being a candidate on the nomination day of the said election.**

(b) **that the 1st respondent's nomination of candidacy on the nomination day of the said election be declared void.**

(c) **that a declaration that the 1st respondent was not duly elected or ought not to have been returned.**

(d) that the 2nd respondent's rejection of the aforesaid objection to the nomination for candidacy to the said election of the 1st respondent be set aside; and

(e) that the said objection by the petitioner and his proposer be sustained and accepted by the 2nd respondent; and

(f) that there being no other candidate other than the petitioner, the petitioner be declared as the only candidate nominated and returned uncontested at the close ofthe said nomination day on 12 March 1990 and such declaration should take effect from the closing of the nomination of candidacy to the said election, on 12 March 1990; and

(g) **that a declaration that the petitioner was duly elected and ought to have been elected.**

(h) that the election held on 24 March 1990 and the result of the same be declared null and void and of no legal effect; and

(i) that the election of the 1st respondent to the Kedah State Legislative Assembly representing the Constituency of N. 23 Pantai Merdeka, Kedah Darulaman be declared null and void and of no legal effect; and

(j) costs; and

(k) that the petitioner may have such further or other relief as the Court shall deem fit.

When the matter came up before me on 15 August 1990 there were three notices of motion to be heard. Enclosure 32 dated 9 August 1990 had been filed by the second respondent asking for the election petition to be struck off on the grounds that it had not satisfied the requirement of s. 32 of the Election Offences Act 1954 (hereinafter "the Act") and r. 4 of the Election Petition Rules 1954. Enclosure 36 filed by the petitioner on 12 August 1990 was for leave to amend the election petition while enclosure 41 was filed on 13 August 1990 by the first respondent for the dismissal of election petition on two grounds. The first was that it had not satisfied the requirement of s. 32 of the Act and r. 4 of the Election Petition Rules 1954 whereas the second was that the issue raised was merely academic in nature as the first respondent was never a bankrupt by virtue of the order in the Kuala Lumpur High Court case D3-29-7415/89 which annulled the adjudication order and rescinded the receiving order made on 21 February 1990 which had the effect of wiping out the bankruptcy proceedings altogether.

Having considered the arguments on all three enclosures together and the authorities, it was my finding that the election petition as originally filed did not fulfil the requirements of the law and as such it was necessary for the amended election petition to be filed. I had accordingly allowed enclosure 36 and consequently had dismissed enclosure 32 and the first prayer of enclosure 41.

As for the second prayer of enclosure 41, which is the only issue left to consider, it all depended on whether the annulment and rescission respectively of the adjudication and receiving orders on 16 March 1990 meant that the first respondent was not a bankrupt on 21 February 1990, when the orders were granted, and on 12 March 1990, when his nomination papers were filed. As this was the very issue pending in the Supreme Court as at 15 August 1990 as regards the appeal in the relevant bankruptcy petition and the issue in this election petition, and as it would not be correct for the election judge to rule on this issue when it was awaiting the ruling of the Supreme Court, and also to avoid any possible conflict of judicial pronouncements, I had adjourned my decision in this matter pending the said appeal.

My decision was accordingly postponed to 30 October 1990 and that day and the two days following were originally fixed for the hearing of this election petition if I were to dismiss the second prayer of enclosure 41. To my mind, the adjournment period of two and a half months was sufficient for the first respondent to take steps to have the appeal heard speedily. Unfortunately, the appeal was not fixed before this date and this matter was left hanging pending the said appeal. Subsequently, it was brought to my notice that the first respondent had withdrawn the said appeal on 20 January 1992.

Based on the submissions on 15 August 1990 and the additional written submissions filed before this date by learned counsel for all three parties, my finding is that the annulment of the adjudication order on 16 March 1990 had the effect of wiping it out altogether. As stated by Stirling LJ in *In Re Keet* [1905] 2 KB 666.

> He is not applying for an order of discharge, but he is applying for an order of annulment under s. 35, which permits that where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, **the court may, on the application of any person interested, by order, annul the adjudication - that is to say, wipe out the bankruptcy altogether, and put the bankrupt in the same position as if there had been no adjudication.** (the emphasis is mine).

The Federal Court in *Kwong Yik Bank Bhd. v. Hah Chiew Yin* [1985] 2 MLJ 452 had reiterated this principle by stating

> It is pertinent to observe that the bankrupt was not applying for an order of discharge but was applying for an or der annulling her adjudication. The effect of this is to wipe out the bankruptcy altogether and put the bankrupt in the same position as if there had been no adjudication order (per Stirling LJ *in In Re Keet)*..

Unlike the example given by learned counsel for the petitioner namely that an order for the dissolution of marriage did not mean that the marriage never took place, I would say that

his comparison is not quite to the point as that involves merely a dissolution and not an order for nullity and that this finding is more appropriately compared to a marriage which had never been consummated, or where the parties are within the prohibited degrees of consanguinity, or when either is not of his or her supposed sex, or is so sexually malformed or impotent as to be incapable of living conjugally with the other, or has a wife or husband living, or is insane, or when the marriage has been brought about by fraud, or is in violation of a legal prohibition or in breach of an essential legal prescription. In that situation, when one party applies to put an end to it on any of the stated grounds and the nullity order is given, it would be similar to the marriage having not taken place at all. As stated by Russell, J. in *Re Wombwell's Settlement* [l922] 2 Ch. 298

> The result of a decree of nullity of marriage is that not only are the parties not now married but they never were.

With this finding, it follows that the first respondent was not a bankrupt on 12 March 1990, that is, on nomination day and was therefore not a disqualified person for the purposes of election. I had accordingly granted the order in terms of the first respondent's second prayer in enclosure 41 but since I believe this is the first time this question of law had been raised and decided, I would order that each party bear their own costs. Consequently, the election petition would have to be dismissed with no order as to costs.

Pursuant to s. 36(a) of the Act, I hereby determine that the first respondent was duly elected to the Kedah State Constituency of Pantai Merdeka on 24 March 1990 and shall issue a certificate to this effect to the Election Commission.

Before concluding it may be of some interest to refer to the Supreme Court of India decision in *Loknath Padhan v. Birendra Kumar Sahu* [1974] 3 SCR 114 where, like the situation in this case, the Legislative Assembly had been dissolved during the pendency of the appeal. The ruling there was

> We are, therefore, of the view that, The Orissa Legislative Assembly being dissolved during the pendency of this appeal, it is now wholly academic to consider whether the respondent was qualified under s. 9A at the date of nomination and since that is the only ground on which election of the respondent is challenged, we think it would be futile to hear this appeal on merits. We accordingly dismiss the appeal with no orders as to costs all throughout.

Similarly here, without or despite my finding this election petition has actually become a matter of academic interest only.